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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 291

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

RIVERSIDE COAL COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America, (called "UMW" herein), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit,[1] entered April 4, 1969, in the case numbered 18,293, styled Riverside

[1] Called "Sixth Circuit" herein.

Coal Company, Inc., plaintiff-appellee[2] v. United Mine Workers of America, defendant-appellant, affirming the judgment entered September 11, 1967 by the United States District Court for the Western District of Kentucky, Owensboro Division,[3] against United Mine Workers of America and in favor of Riverside for $20,000 and costs (41a).[4]

A certified transcript of record in said case, with the proceedings in the Sixth Circuit is furnished herewith, in accordance with this Court's rules.

OPINIONS BELOW

The Sixth Circuit's opinion appears in Appendix A to this Petition (pp. A19-35); and in the certified transcript of record. The opinion is not officially reported but is unofficially reported in 70 LRRM 3215 and 59 CCH Labor Cases ¶ 13,401.

The District Court's memorandum appears in Appendix A to this Petition at pp. A1-18; and in the certified joint appendix at pp. 23a-41a. The memorandum is not reported.

JURISDICTION

The Sixth Circuit's judgment was entered April 4, 1969. This Court's jurisdiction is invoked under 28 USCA § 1254(1) and 2101(c).

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[2] Called "Riverside" herein.

[3] Called "District Court" herein.

[4] Page references with the suffix "a" are to the certified joint appendix, as filed in the Court of Appeals, one certified copy of which is filed with this Petition. References to the Appendix to this Petition are indicated by the symbol "A".

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction of the District Court was based upon Section 303 of the Labor Management Relations Act, 1947[5] (29 USCA 187) and upon the theory of pendent jurisdiction, by which it was found the District Court had jurisdiction to determine Riverside's alleged state law cause of action.

QUESTIONS PRESENTED

1. In a primary strike with picketing at the entrance to the primary employer's premises may a finding of secondary boycott violative of Section 303, Labor Management Relations Act, 1947, be based on isolated acts of unknown persons away from the premises, directed against "independent" truckers performing work directly related to the employer's normal production operations?

2. In an action for damages against a labor union in which the Norris LaGuardia Act's "clear proof" rule is applicable, is "clear proof" of union authorization of threats and acts of violence established by evidence of acts of a union representative whose authority was merely to organize employees and process their grievances, or by evidence of isolated acts of unknown and unidentified persons?

3. May the total losses sustained in consequence of an economic strike be awarded as damages where the strike was carried on for a lawful purpose, and, except for isolated threats and acts of violence, in a lawful manner?

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[5] Herein called "Act".

STATUTES INVOLVED

The statutory provisions involved are Section 6, Norris-LaGuardia Act, 29 USC § 106, Act of March 23, 1932, 47 Stat. 70; Section 301(e), Labor Management Relations Act, 1947, 29 USC § 185(e); and Section 303, Labor Management Relations Act, 1947, prior to its amendment in 1959, 29 USC § 187, Pub. L. No. 101, 80th Cong., 1st Sess., 1947, 61 Stat. 136. These statutory provisions are set forth in Appendix A hereto.

STATEMENT OF THE CASE

Riverside, a Kentucky corporation, sued UMW under Section 303 and state law for damages allegedly sustained in a 1959 strike (3-7a, 8-10a, 17-20a). Upon issues joined (11-15a, 15a-16a, 21a) the case was tried to the Court without a jury. The District Court found violations of both federal and state law and directed entry of judgment of $20,000 (23a-41a). Judgment was entered accordingly (41a).[6]

On appeal the Sixth Circuit affirmed the judgment as entered (p. A34).

STATEMENT OF THE EVIDENCE

I

James Jessup operated a strip coal mine in Muhlenberg County, Kentucky, as a proprietorship, Jessup Coal Company, from 1957 until October 1958, under a UMW agreement.

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[6] James Jessup, principal Riverside stockholder, and proprietor of Riverside's predecessor in interest, Jessup Coal Company, was also a plaintiff in the action. Jessup's action, based on two earlier disputes, was dismissed by the District Court. No appeal was taken from that dismissal, hence except as evidence of the earlier disputes relates to the Riverside dispute, Jessup's action is no longer material.

In October 1958, Jessup incorporated his business as Riverside Coal Company, Inc. and assigned a lease (the "Mercer-Moore Lease") to Riverside.[7] Subsequently, Riverside operated on the premises of the assigned lease, also in Muhlenberg County, with the same equipment formerly used by Jessup and "part" of the Jessup employees (459a).

Riverside contended it was not bound by the Jessup-UMW agreement then still in effect (75a), but subject to termination on 60 days' notice. UMW gave notice of termination which became effective in early March 1959, and pending termination urged Riverside to enter into a new agreement. Riverside declined for economic reasons and the strike which ensued led to the present litigation (A11-12).

The strike commenced on April 16 with Riverside pit employees picketing at the mine entrance. As the strike continued the pickets were joined from time to time by field representatives from UMW's District office, as well as numerous other miners from the area. The picketing continued until mid-May. Riverside ceased operations at its Pond Creek site sometime in June or July and reopened in nearby Ohio county (80a, 99a, 101a).

The District Court found that during the strike there were violations of both Section 303 and Kentucky common law, for which UMW was legally responsible. The District Court further found these violations damaged Riverside in the amount of $20,000. The Sixth Circuit, Circuit Judge Edwards dissenting, found the District Court's finding not clearly erroneous, and affirmed.

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[7] The incorporation of Jessup's business followed institution of suit by the UMW Welfare and Retirement Fund against Jessup for unpaid royalties totalling $21,407.60, which the Fund eventually recovered. As found by the District Court, Jessup had misrepresented the extent of his obligation in his periodic reports to the Fund (24a).

The Evidence of Secondary Boycott

The Sixth Circuit correctly found, on the authority of *United Steelworkers* v. *NLRB*, 376 U.S. 492, and *Local 761, Elec. Workers* v. *NLRB*, 366 U.S. 667, that the picketing at Riverside's mine entrance was clearly "primary activity" and not violative of Section 303 "even though this entrance was used by *independent* truckers as well as regular employees of the mine."

The Sixth Circuit, however, found secondary activity from what it termed "threatening and violent conduct away from the primary site", directed against "neutral secondary parties".[8] This finding was expressly based on testimony of two "independent" truckers who hauled Riverside's coal (A28). One of these, Raymond Bethel, testified of being awakened at his home, some distance from the mine, by loud noises that sounded like "firecrackers". He also testified that car loads of men yelled at him as they passed his home. (165a-173a).[9] The other, Robert Sutton, testified that as he was driving his truck home after work on one occasion he was shot from ambush by an unknown assailant (207a-214a).

Bethel and Sutton and the other truck drivers were stipulated to be "independent", i.e., they were not on Riverside's payroll (174a). The method employed by Riverside with respect to the truck drivers varied from time to time, but essentially it was to hire a truck owner, who would himself drive the truck (Bethel and

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[8] The District Court found a violation of Section 303 but did not refer to the evidence on which it based its finding.

[9] Bethel testified that he thought the car that carried the men who yelled at him belonged to Arthur Chan[illegible], a UMW representative, but he "could not swear he was driving it." (168a)

Sutton were of this type) or hire someone to drive, to haul the coal for a fixed amount per ton. During the period in question Riverside's mine foreman also served as the trucking contractor. The truckers performed a normal part of Riverside's operation—the hauling of coal from mine to preparation plant. Though the truckers and the Riverside miners performed a unified production operation, the truckers were deemed "neutral" by the Sixth Circuit (A28-29).[10]

The Bethel and Sutton incidents, the Sixth Circuit found, "were clearly violative of Section 303" (A29).

The Clear Proof of UMW's Responsibility

During the strike UMW field representatives were present from time to time at the picket line at the Riverside mine entrance. These men were *admittedly* "agents" of the union with authority to conduct organizational work.

The District Court found one of the field representatives made "threats of violence" against Riverside and its truckers. Field Representative Chaney was found to have told a state trooper (after mine owner Jessup attempted to run him down with an automobile) that if the trooper didn't do something about it, "they would take the law into their own hands". It was also found that Chaney threatened pit employees, saying, "we will get you . . . if we don't get you down

[10] Even apart from relationship apparent from the unified operation, the finding that the truckers were neutral is challenged by the fact that the neutral truck operators included a Riverside employee (59a), the Riverside foreman (174a-175a) and Jessup himself (176a). A paradox of the Sixth Circuit's decision is that Jessup, Riverside's principal owner, was a primary employer and a "neutral" secondary employer at the same time!

here we will get you on the way home. You will never eat supper at home tonight" (A3-4). From this evidence the District Court found a violation of state law, saying "there is clear and substantial proof to establish agency so as to hold the union responsible for the wrongful acts of these officers . . ." (A4). The District Court did not comment on either the applicability or requirements of Section 6 of the Norris-LaGuardia Act in its memorandum and this was the basis for one of UMW's assignments of error before the Sixth Circuit.

The Sixth Circuit affirmed on the basis of the conduct of the field representative referred to above. The Sixth Circuit acknowledged the applicability of Section 6, but noting the evidence referred to above, it said "UMW's agents were actually involved in the threats of violence which took place" (A25-26). Without discussion of the field representatives' authority to commit such acts, and without pointing to any evidence that the particular acts complained of, or acts of that character, had been authorized by UMW, the Sixth Circuit concluded thusly (A26):

> "In view of the authorities and the evidence, UMW must be said to have 'participated in' or 'actually authorized' the acts of its appointed agents charged with the extension of the 1958 Amendment."

It is not clear from the opinion that the Sixth Circuit based its finding of state law violation on the acts of unknown persons away from the picket line. It is implicit, however, that the Sixth Circuit did so, for it noted (A33), "the record is replete with incidents of violence and threats of violence"; and that ". . . violence was involved in both primary and secondary

activities and the consequences were inseparable." (A33, footnote 5 to the opinion).

The Evidence of Damages

The District Court awarded compensatory damages of $20,000.[11] It based the award on lost profits and the value of a lease Riverside surrendered but did not allocate specific amounts to either factor. No explanation of how the amount was arrived at is found in the opinion.

The District Court stated that the "proof of damages . . . leaves much to be desired" (A17). The Sixth Circuit, however, in affirming the award, found the evidence "sufficient to support an award in excess of that allowed by the District Court" (A32).

Circuit Judge Edwards, believing the evidence failed to sustain the action under Section 303, would have remanded for computation of damages resulting only from state law violations (A35).

With respect to an allowance for the loss of profits the District Court found the evidence insufficient to show earnings for Jessup Coal Company prior to the organization of Riverside. It termed Riverside's estimates for future earnings "gross speculation based on entirely false assumptions" (A15). It described them "far too speculative and remote to be recoverable" (A16). The District Court noted that Riverside's accountants calculated a profit of $36,860 for the period beginning November 1, 1958, and ending April 30, 1959, but further noted that the accountants failed, without "any sound basis" to apportion certain

[11] The District Court denied punitive damages, saying, "Jessup's provocative acts of violence cannot be excused" (A18).

expenses to that period. Evidence offered by UMW was to the effect that had proper expenses been allocated to that period a loss rather than a profit would have been sustained. The District Court evidently struck a balance in allocating these expenses, though it did not explain how it did so, and awarded damages for loss of profits accordingly (A13-17). *The District Court, however, did not in any manner undertake to apportion any of the losses sustained by Riverside which resulted from the manifestly legal element of the dispute, that is, the losses sustained by reason of the lawful aspects of the picketing and the refusal of its employees to work under terms not acceptable to them.*

In considering the value of the lease which Riverside surrendered, the District Court rejected as a "hyperbolic figure" Riverside's estimate of its value at seven million dollars (A14-15). The District Court did assign a small value to the lease, however, in that it was subsequently assigned to another, Herman Genet, Inc. Genet paid four thousand dollars for the lease, but even Genet, with equipment larger than Riverside's, determined the property could not be profitably mined. The lease did not become profitable until five years later when it was subleased by Genet to an operator with equipment far more extensive than either that of Genet or Riverside (A13-17).

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The Sixth Circuit's approval of the District Court's finding of violation of Section 303 on the basis of responsibility for the acts of unknown persons conflicts with this Court's decision in *United States* v. *White*, 322 U.S. 694, with that of the Court of Appeals for the District of Columbia in *International Ladies Garment*

Workers Union v. *NLRB,* (D.C. Cir., 1956), 237 F.2d 545, and with numerous decisions of the National Labor Relations Board, and constitutes an improper implementation of the agency requirements of Section 301(e) of that Act. Its finding of violation of Section 303 based on isolated acts away from the situs of the dispute directed against persons performing a regular part of the primary employer's production operation, is also in conflict with this Court's decisions in *United Steelworkers* v. *NLRB,* 376 U.S. 492 and *Local 761, Elec. Workers* v. *NLRB,* 366 U.S. 667; and with the decision of the Court of Appeals in *Local 24, International Brotherhood of Teamsters* v. *NLRB,* 266 F.2d 675 (D.C. Cir., 1959).

The Agency Issue. A purpose of Taft-Hartley's Section 301(e) was to remove the burden of Section 6 in suits under that Act and in NLRB proceedings. *United Mine Workers* v. *Gibbs,* 383 U.S. 715. Its purpose was to restore, in those proceedings, "ordinary doctrines of agency". *Id.* p. 736.

Congress did not mandate, however, that union responsibility could be imputed in the absence of evidence of agency. Section 301(e) makes the existence of the agency relationship, though not its scope, the central issue.[12] Though Section 6 does not apply, some standard of proof is nevertheless required. Review of the Sixth Circuit's decision is warranted to establish that standard and thus implement an important aspect of national labor policy.

The significance of the instant case is that agency findings were made in the absence of evidence and on the basis of speculation. Indeed, the Sixth Circuit, in finding a Section 303 violation, predicated its decision

[12] Section 301(e) is set forth at page A38, Appendix A herein.

on acts of unknown persons on which the District Court did not state a reliance.

An inference of agency may not be drawn from the fact of membership in a union, *United States* v. *White,* 322 U.S. 694, *International Ladies Garment Workers Union* v. *NLRB,* 237 F.2d 545 (D.C. Cir., 1956). Hence it follows that no such inference may be drawn from evidence of an act of an unknown person which occurs during a dispute, even if it is assumed that that person was a union member.

The Sixth Circuit's decision is plainly at odds with those of the NLRB. The Board has ruled that even a member's prominence in an organizing campaign is not "sufficient to establish an agency". *Electric Wheel Company,* 120 NLRB 1644, 1647 (1958).

Similar decisions abound. The Board said in *National Union of Marine Cooks and Stewards,* 87 NLRB 54, 75 (1949) where two men were beaten in the course of a labor dispute by unidentified assailants: "The testimony suggests that some members of the Respondent union may have committed the assault . . ., but that is mere speculation. Under these circumstances I do not feel warranted in finding the Respondents responsible for the assault on (the two men)". And in *Lumber and Sawmill Workers Union,* 87 NLRB 937, 940-941 (1949), the Board said, "There is absolutely no evidence to connect the Respondent with Knights' [the alleged agent] action. A suspicion is not evidence, nor is it a substitute for proof." In *Blue Ridge Coal Corp.,* 129 NLRB 146 (1960), the Board refused to find UMW liable for an assault, saying:

> "This incident occurred more than a mile distant from the entrance to the Marra Brothers mine,

> and Williams was unable to identify any of the men present. Under these circumstances, and particularly in view of the facts that there was no union agent present who might have repudiated the threat and no evidence that the men who made the threat were pickets, we do not attribute responsibility for this incident to the Respondents."

The Sixth Circuit did not explain its basis for decision on this issue. Quite obviously, however, its sweeping approach is at complete variance with that followed in the above decisions.

The Boycott Issue. The primary nature of the strike and picketing is clear and was acknowledged by the Sixth Circuit. The Sixth Circuit, however, found incidents at the homes of two truck drivers secondary in nature, and warranted the finding that UMW violated Section 303.

The agency question aside, UMW contends that the isolated nature of this conduct and the absence of inducement to concerted conduct of the type Congress sought to proscribe in enacting Section 303, make the conclusion inapposite and erroneous. To find this conduct secondary rather than, at most, a part of the primary dispute, and thus permit the prosecution of this state law action in federal court under *Gibbs'* pendent jurisdiction doctrine, is surely to have the tail wag the dog. The equivalent of the conduct here involved was before this Court in *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665 (1951). As in *Rice Milling,* here the inducements were:

> "not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of Section 8(b)(4), and they do not here."

Plainly the instant case is at odds with the *Rice Milling* decision.

The finding of violation of Section 303 is further erroneous for the reason that the truckers, while "independent", which is to say they were not on Riverside's payroll, were not "neutral" within the contemplation of Section 303. Congress, in enacting Section 303, sought to protect employers "wholly unconcerned", but did not seek to shield an employer "acting as a part of the primary employer."[13] This Court implemented the purpose of the statute, as thus confined, in *Local 761, Elec. Workers* v. *NLRB,* 366 U.S. 667, where it held that subcontractors performing a normal part of the primary employer's operation was not entitled to insulation from the primary dispute.

The truckers here involved are plainly of this character. They were hired to perform an integral part of

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[13] During the debate on Section 303 Senator Taft explained that the provision "makes it unlawful to resort to a secondary boycott to injure the business of a third person *who is wholly unconcerned* in the disagreement between the employer and his employees." (93 Cong. Rec. 4323; emphasis ours.)

Senator Taft was questioned as to the application of the provision in a situation where a dress manufacturer has his cut goods sent to contractors whose workers sew and complete the dresses according to the manufacturer's specifications, with the dresses then returned to the manufacturer for sale. Senator Taft reasoned that the provision would have no application. He said (95 Cong. Rec. 8709):

> "Mr. President, the secondary boycott ban is merely intended to prevent a union from injuring a third person who is not involved in any way in the dispute or strike, and, therefore, should not suffer economic damage simply because of the action of a labor union. It is not intended to apply to a case where the third party is, *in effect in cahoots with or acting as a part of the primary employer.*" (Emphasis ours.)

a straight line operation. In every relevant sense they acted "as a part of the primary employer."

The Sixth Circuit, in *United Mine Workers* v. *Osborne Mining Company,* 279 F.2d 716 (1960), cert. denied, 364 U.S. 881, found similar truckers independent and neutral. Its decisions in *Osborne* and here, however, are in conflict with *Local 24, International Brotherhood of Teamsters* v. *NLRB,* 266 F.2d 675 (D.C. Cir., 1959), which involved a similar trucking operation. The *Teamsters* decision rejected solution of the issue by a "legalistic word or phrase" such as "independent contractor", and found in the comparable realities of that case that the independent truck owners were not neutral employees. The decision thus gave full recognition to the view we insist is correct. The conflict in these decisions is further basis for review by this Court.

QUESTION TWO

The affirmance of the District Court's judgment was based on the Sixth Circuit's conclusion that "the requirements of Section 6[14] have been met as to the common law claim" (A26). This conclusion was in turn based on the finding that "UMW's agents were actually involved in the threats of violence which took place" (A25-26).

The underlying facts upon which this finding is predicated are statements made by a field representative, detailed above, charged with the duty of unionizing

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[14] Section 6 reads thus:

"No officer or member of any association or organization and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

mines in UMW's District 23 and extending the union agreement. There was no evidence of any additional authority in the field representative and specifically there was no evidence that defendant union as an entity authorized or participated in any of the alleged unlawful conduct of the character charged either by way of an express grant of authority or by custom or traditional practice. There was, in fact, an absence of such evidence.

The Sixth Circuit's judgment, thus viewed, conflicts with this Court's decisions in *United Brotherhood of Carpenters* v. *U.S.*, 330 U.S. 395 and *United Mine Workers* v. *Gibbs*, 383 U.S. 715.

The Sixth Circuit correctly held that the requirement of Section 6 was applicable to Riverside's common law claim. The District Court's opinion was silent on this issue but it is clear that it did not apply Sec. 6. The District Court did find "clear and substantial proof to establish agency" (A4), but the fact of agency was not an issue. The agency status of UMW field representatives was admitted. *The issue was what standard of responsibility should be applied in determining the responsibility of UMW —under Section 6—for the conduct of its agents for an alleged violation of state law.*

This Court has made clear that mere proof of agency to perform lawful acts in furtherance of the lawful activities of a union does not suffice, under Section 6, as a basis to impose liability on a union for the wrongful acts of that agent. A requirement beyond the normal requirements of agency was the purpose of Section 6. In *Carpenters* it was explained thusly (330 U.S. 395, 406-7):

> "... We are of the opinion that the requirement of 'authorization' restricts the responsibility or

liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, *except upon clear proof that the particular act charged, or acts generally of that type and quality had been expressly authorized,* or necessarily followed from a granted authority, by the association or nonparticipating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence." (Emphasis ours)

The conflict with the instant decision is manifest. Absent any evidence on the issue posed by the underscored language in *Carpenters* quoted above, the Sixth Circuit found bare evidence of agency sufficient. It is impossible to resolve the decision in the case at bar and the *Carpenter's* decision.[15]

The Sixth Circuit construed *Gibbs* to mean that a union is unconditionally liable for the acts of its agents, without regard to any evidence that the union actually authorized its agents to commit those acts. This interpretation is erroneous. In *Gibbs* there was an absence of evidence of the agent's involvement in wrongful acts, hence the issue of his authority to have

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[15] The Sixth Circuit stated that "UMW must be said to have participated in' or 'actually authorized' the acts of appointed agents". (A26). In our view the finding of "participation" is inapposite, for if there is an absence of evidence of authorization, what the individual did could not be construed as "participation" on UMW's part. Authorization is the issue. Obviously if participation without authorization suffices the decision in *Carpenters* is quite meaningless.

committed them was never reached. But that the breadth of authority is an issue is the clear mandate of Section 6 and the precise ruling in the *Carpenters* case.

The Sixth Circuit's decision also held UMW responsible, under Section 6, for the acts of unknown persons. What we have stated above answers that determination, for if Section 6 requires "clear proof" of union's actual authorization of the unlawful acts surely it precludes liability for the acts of unknown persons.

The driving force behind Section 6, as this Court stated in *Gibbs,* was the fear that unions might be destroyed if they could be held liable for acts beyond their practical control. It categorically rejected the concept of conspiracy which characterizes the approach of the Sixth Circuit in the case at bar.

The increasing frequency of common law actions for damages against unions in the federal courts warrants review of this decision to the end that the appropriate standard of proof in such cases, and the proper application of that standard, will be followed by these courts as set forth by the decisions of this Court.

QUESTION THREE

In affirming the District Court's award of compensatory damages for loss of profits without allowance for losses which resulted from the legal aspects of the dispute, the Sixth Circuit's decision conflicts with the decisions of this Court in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, *Teamsters Local 20* v. *Morton,* 377 U.S. 242, *Youngdahl* v. *Rainfair, Inc.,* 355 U.S.

131 and *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236. And in awarding damages attributable to the remote consequences of the dispute in terms of the future value of a lease, the decision conflicts with *United Mine Workers* v. *Gibbs, supra.*

The fact that disorder may occur in the course of a labor dispute does not entitle an employer to recover all losses sustained as a consequence of that dispute. Recovery may be had only for the direct consequences of wrongful conduct and *Gibbs* teaches that this "does not include consequences resulting from associated peaceful picketing or other union activity", 383 U.S. 715, 729. To be sure, the District Court states that Riverside sustained damages "by reason of the defendant's wrongful conduct in the sum of $20,000" (A17) But, as we have shown, what the District Court did in fact was not to predicate an award on damages which flowed from unlawful acts but was to award damages based upon an estimate of Riverside's *total* losses. Neither the District Court nor the Court of Appeals considered the consequences of the lawful activity of the strikers on the business of Riverside, and their decisions cannot be construed to have taken the consequences of the lawful aspect of the dispute into account. The concept of thus awarding damages based on the totality of losses was rejected by the *Gibbs* decision.[16]

The award of damages affirmed by the Court of Appeals further conflicts with *Gibbs* and the other decisions cited above in that the award in fact grants unto the plaintiff damages which are speculative and remote. This is apparent from the award of damages

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[16] See *Review of Developments in Labor Damage Suits,* Mozart G. Ratner, 63 Labor Relations Reporter (BNA) 311.

for the loss of a lease without value at the time of its surrender and of value years later only under entirely different operating circumstances. *Gibbs* requires that damages be "strictly confined" to the "direct consequences" of the tort. It does not permit the recovery of remote and speculative damages upon evidence which described by the District Court itself as "leaving much to be desired".

Review of the Court of Appeals' decision is warranted because of the conflicts in that decision and the above decisions of this Court to the end that a proper standard of the determination of damages in these cases may be made clear.

CONCLUSION

Petitioner prays that this petition for Writ of Certiorari be granted and that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals entered in case No. 18,293 on April 4, 1969.

Respectfully submitted,

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APPENDIX

Memorandum of the United States District Court

(Filed September 11, 1967)

MEMORANDUM

This case was tried before the Court for alleged violations of Section 303 of the Labor Management Relations Act, 1947, 67 Stat. 158, as amended, and of the common law of Kentucky. The issues arise out of three labor disputes between the two plaintiffs, James Jessup, d/b/a Jessup Coal Company, and Riverside Coal Company, Inc., and the defendant, United Mine Workers of America. On the first two occasions Jessup was doing business as a proprietorship, and upon the third occasion he was the principal stockholder of the Riverside Coal Company, Inc., a corporation he formed with members of his family holding the balance of the issued stock.

The primary cause of the labor disputes involved in this case did not arise from the traditional struggle between a union and a non-union mine operator. Jessup signed a contract with the Union when he was operating as a proprietorship and it was not because he objected to running a union mine that he refused to sign a contract after he incorporated. His refusal to sign was based on the economic fact that he could not operate at a profit under the agreement since it required a payment of 40 cents per ton to the United Mine Workers' Welfare and Retirement Fund on all coal produced. Even when the Jessup Coal Company signed with the Union he stated that his was a small, new operation and he could not afford to make the Welfare and Retirement Fund payments. Actually, he never did make all the payments due after signing his contract. In his reports he misrepresented the coal tonnage produced and only paid approximately 25 percent of the amount he owed. The Welfare and Retirement Fund was

forced to bring suit and eventually it recovered the sum of $21,407.60.

The principal actors in the events surrounding these labor disputes are the plaintiff, James Jessup, and Arthur Chaney, a district representative of District 23 of the defendant, United Mine Workers of America. The evidence as well as the demeanor of these two men as witnesses shows them to be men set in their determination, physically unafraid, and no strangers to the display of force and violence. It should also be noted that it is difficult to attribute their contradictory testimony relating to the circumstances of this case solely to the fact that this action which covered a period from the latter part of 1957 through July, 1959, was not tried until some eight years later.

The evidence discloses, among other incidents of violence, that at times material to this case, the plaintiff, James Jessup, was arrested and convicted of pointing a gun at the pickets; that he rammed one of his truck drivers' automobiles in a fit of anger and with such force that the cars had to be pried apart; that both he and his son bore arms; that some five or six of his truck drivers were also armed and were disarmed by the Sheriff; and that on one occasion while driving his car he appeared to deliberately attempt to run down some of the pickets, including Arthur Chaney.

The representative of the United Mine Workers, Arthur Chaney, was an active representative of District 23 for almost thirty years. He started working in the coal mines in western Kentucky when he was only sixteen years of age and has been a militant member of United Mine Workers since that time and actively engaged in organizing the coal fields in both eastern and western Kentucky since 1937. During the early days, attempts to unionize the Kentucky coal fields were marked by force and violence. See National Labor Relations Board v. United Mine Workers, 195 F.2d 961 (6th Cir., 1952), a unionizing effort in which

Chaney was involved. Also within the setting of this case, Chaney is charged with threatening and abusing the plaintiff's employees on numerous occasions, all of which he denies. On October 7, 1957, he was going to help the plaintiff's truck drivers to " * * * fight it out. * * * 'We make our own rules and go by them'." On October 8, 1957, he threatened " * * * if the men didn't come out of the pit, they was going up there and beat them up and throw them out." Then on October 16, 1957, he threatened the truck drivers that if they did not cease hauling coal their trucks would be overturned. On the same date he went to the mine and threatened plaintiff's employees. On June 13, 1958, he and some pickets went to the pit and threatened the employees "If they didn't get out, he was going to throw every damn one of them out * * *." On the same date he told plaintiff that he was going to put him out of business saying " 'We are going to do away with every damn one of you little dog holes, * * *. They aint't (sic) nothing but a headache. We want you out of business and get out of our way'." You're not " * * * going to haul over to Hopkins County." On and after April 20, 1959, Chaney and other representatives of the defendant caused a large number of pickets to mass at the intersection of the public highway and the mine road. The plaintiff testified the pickets numbered "up around 500 at one time." While from all the evidence it would appear that not many more than 100 pickets appeared at any one time, under the circumstances, this mass picketing was still purposely conducted in sufficient numbers to of itself amount to intimidation. The pickets at times would block the ingress and egress from the highway into the pit road leading to plaintiff's mine, and they continuously used violent language, gestures and other means to threaten plaintiff's employees. On the occasion that Jessup appeared to run him down, Chaney and another representative of the Union angrily told the officer in charge of the state troopers that if he didn't do something about it " * * * they would take the

law into their own hands." On May 16, 1959, he threatened the pit employees, saying " 'We'll get you * * * if we don't get you down here, we'll get you on the way home. You'll never eat supper at home tonight'."

During the time material to this action, there were also a number of other representatives of the United Mine Workers who, together with Chaney, were charged with the duty of unionizing the mines in District 23, and to extend the National Bituminous Coal Wage Agreement of 1950 by signing its December, 1958 amendment. Among them were Edward J. Morgan, who served as President; and Jess Lovelace, who was the Secretary-Treasurer of District 23. All of these officers and representatives were appointed by the authorized International Offices of United Mine Workers, the defendant, and there is clear and substantial proof to establish agency so as to hold the Union responsible for the wrongful acts of these officers, both on the claim asserted under Section 303 and the state claim based on common law conspiracy. See United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); White Oak Coal Company v. United Mine Workers of America, 318 F.2d 591 (6th Cir. 1963).

This evidence is hereafter briefly summarized as to each of the three labor disputes that give rise to this action. It establishes that the recovery of appropriate compensatory damages is warranted based both on secondary boycott activities under Section 303, 29 United States Code Section 187, and on the state conspiracy charge since it is established a conspiracy existed in which the Union participated in violent acts which intentionally resulted in damages to plaintiff's business. See Mine Workers v. Gibbs, supra; San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Flame Coal Company v. United Mine Workers of America, 303 F.2d 39 (6th Cir. 1962); United Mine Workers of America v. Meadow Creek Coal Company, 263 F.2d 52 (6th Cir. 1959); District Union Local 227, Amalga-

mated Meat Cutters, etc. v. Fleischaker, Ky., 384 S.W.2d 68 (1964); United Construction Workers v. New Burnside Veneer Company, Ky., 274 S.W.2d 787 (1954).

First Labor Dispute.

In 1957, Jessup began operation of a small strip mine located in Muhlenberg County, in what is known as the Harps Hill area near Depoy, Kentucky. After the coal was stripped, it was hauled by truck to a loading ramp operated by Jessup in Depoy, and there loaded into railroad cars. The truckers hauling the coal owned their own trucks and the owners either operated the trucks themselves or employed drivers at compensation agreed upon between them, and in which arrangement plaintiff did not participate. These truckers paid all the costs of operation and maintenance. Moreover, the plaintiff did not direct them as to how to do the hauling, how much to haul in a load, or exercise control over them in any way. They were not paid a daily wage, but were paid on a tonnage basis of 40 cents per ton. Some of the truck drivers were members of the United Mine Workers, as were some of plaintiff's mine employees. The plaintiff did check off union dues from all his union employees.

In February of 1957, Chaney requested Jessup to sign a collective bargaining agreement with United Mine Workers, and he did execute such a contract effective as of April 1, 1957. On the morning of October 7, 1957, some five or six of the truckers who were members of the Union approached Jessup and requested an increase of 10 cents per ton to haul his coal. He angrily refused their demands, cursed them, and ordered them off the premises. That afternoon, Chaney, whose intervention had been solicited by the truck drivers, told Jessup that the Union would support the truckers' request for an increase. The next morning he appeared at the mine pit and urged the pit employees to go home because the truckers were not going to haul any more coal until their demands for an increase had been met.

Jessup testified that Chaney was not "too rough" on this occasion.

The pit employees continued to work until the morning of October 16, 1957, and in the morning on that date they loaded the trucks of some replacement drivers who had been engaged by Jessup. On their way to the ramp at Depoy, these replacement truckers were flagged down several miles from the mine by Chaney and a group of the former truckers. It was on this occasion that Jessup claimed that Chaney and his former drivers threatened to overturn their trucks if they hauled any more coal. Regardless of the amount of coercion it was effective and the replacement drivers, after delivering the coal they were hauling to Depoy, did not return to the mine. All the drivers hauling coal on this occasion were independent drivers who were either the owners of the trucks they drove or employees of the truck's owner. Following this incident, Chaney and the union drivers went to the mine pit, told the pit employees that the replacement truckers had quit and threatened to pull them out of the pit unless they ceased work. The employees did leave the pit and on Chaney's instructions left the shovel and other heavy mining equipment where it was at the time they stopped working.

The pit men did not return to work until December 2, and it was not until December 10 that the truckers resumed hauling. However, during this work stoppage there was an abnormal rainfall, particularly in November, and the shovel which had been left in the pit on October 16 was partially covered by water and was not removed until the latter part of November. Also, while the mine was shut down, many of the pit employees worked at Jewel City where Jessup, who was also engaged in the construction business, had a road under construction. It was his practice to alternate many of his employees between his mining and his construction operations. It is not at all clear from the evidence how much of the shutdown time of the mine

was attributable to the strike and how much was due to the abnormal rainfall and plaintiff's road building activities. When the mine resumed operations in December, Jessup continued to pay his truckers on a tonnage basis; however, he did pay the union truck drivers with two checks, one being designated wages and the other for the use of their trucks. The drivers wanted it this way to assure eligibility for Welfare Fund benefits.

Damages.

The plaintiff claims that as a direct result of this first work stoppage, he sustained loss of profits in the sum of $9,498.91, damage to the shovel left in the pit in the sum of $20,000., and $17,383.31 down-time, or loss of use of his equipment, for a total of $46,882.22.

However, plaintiff's proof and the inferences that can reasonably be drawn from it fail to establish the amount of damages, if any, that was sustained as a direct result of this first work stoppage. His records were incomplete and the only basis for his claim that he was making a 25 per cent profit was his unsupported statement. His own bookkeeper admitted the records did not contain such figures and stated he had accepted the profit estimate of his employer. A certified public accountant who examined the records for the defendant testified it was impossible to determine from them Jessup's profit or loss and found no records to support the 25 percent estimate. Also, the income tax return of the plaintiff for 1957 shows a net profit from his coal mining and road construction business of $2,234.71. He made some money in his road construction business but assuming he broke even, if he had paid the Welfare Fund the amount due under his contract, his net loss from his mining operation in 1957 was more than $10,000, a loss on every ton of coal produced by him.

As stated in United Mine Workers of America v. Osborne Mining Co., 279 F.2d 716-727 (6th Cir. 1960), cert.

denied 364 U.S. 881, "Profits are recoverable where there is an established business and they can be proven with reasonable certainty." Plaintiff's business was not established and his alleged profits were not proven with reasonable certainty. "[L]oss of profits must be established by at least a reasonable probability and not on sheer speculation and guesswork", Mitchell Coal Company v. United Mine Workers of America, 313 F.2d 78-79 (6th Cir. 1963) and "[t]hose [damages] that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable." United States v. Griffith, Gornall and Carman, Inc., 210 F.2d 11-13 (10th Cir. 1954); Palmer v. Connecticut Railway and Lighting Co., 311 U.S. 544 (1941); Spencer v. Woods, Ky., 282 S.W.2d 851 (1955); and Western Union Telegraph Co. v. Ramsey, 261 Ky. 657, 88 S.W.2d 675, 103 A.L.R. 541 (1935).

The claim for alleged damages to the shovel must also be disallowed. Although it was testified that Chaney and the union drivers threatened plaintiff's employees into abandoning the pit on October 16, 1957, and ordered them to leave the shovel where it was, there was still ample time for removal of the shovel by the plaintiff before it could have been damaged by water due to abnormal rainfall. Any damage that may have been sustained was not proximately caused by any act of the defendant. There is also substantial evidence that the equipment was not damaged by the flood and was operated for a "couple of months" after the water episode before the failing of a bearing occurred.

To support his claim for down time or loss of use of equipment during this work stoppage, the plaintiff introduced evidence of the rental value of mining equipment.

However, there was no satisfactory explanation of how rental value of equipment, which would necessarily include a high accelerated depreciation and a profit for the renter, could establish an expense to the plaintiff sustained because of his own equipment being idled by a shutdown of his mine. There must be some reasonable basis offered for the computation of damages. Eastman Kodak Company of New York v. Southern Photo Materials Company, 273 U.S. 359 (1927); United Mine Workers of America v. Osborne, supra; and they must be susceptible of ascertainment in some manner other than by mere speculation, conjecture or surmise. Western Union Telegraph Co. v. Ramsey, supra; Mitchell Coal Company v. United Mine Workers of America, supra; Spencer v. Woods, supra. The claim for loss of use of equipment must be denied.

Second Labor Dispute.

In the early part of 1958, while Jessup was furnishing coal to the Tennessee Valley Authority, he was advised that the ash content of his coal was too high for it to be acceptable. He then made arrangements with the Norton Coal Company, whose facilities included a preparation plant in Nortonville, Kentucky, where the ash could be removed from his coal. A contract was entered into on July 14, 1958, with the non-union Norton Coal Company, whereby it could act as sales agent for Jessup, process his coal and pay him 70 per cent of the receipts from gross sales. On June 12, 1958, Jessup began trucking coal to the non-union Norton Coal Company tipple in accordance with his contract. On that day Jess Lovelace, Secretary-Treasurer of District 23, at a point at the junction of the highway some two miles from Jessup's mine, met with the truck drivers and told them that the union truckers would lose their welfare benefits and that no trucker, union or independent, was to haul coal to a non-union tipple. He spoke to them in a threatening manner, demanding that they dump their coal and not undertake

any future deliveries. The plaintiff, Jessup, arrived on the scene and was told by Lovelace that the truckers would not be permitted to deliver coal to a non-union company. Some of the truckers hauled their coal back to the mine and dumped it. One or two delivered their loads to Nortonville, but none of them returned to haul any more coal on that date. The following morning the union drivers with Chaney and other Union representatives began picketing at the mine entrance with more than 100 union pickets, and the entrance road to the mine was blocked. Chaney with other union men also went to the mine and told the miners to cease work or they would throw them out of the pit. By June 17, 1958, Jessup had hired some replacement drivers, at least three of them being employee drivers of a hauling contractor. These drivers were also flagged down on their way to Nortonville by the striking union truckers, and by Lovelace, and were threatened and coerced into returning their loads to the mine and to cease hauling.

The mine did not resume operation until July 14, 1958. However, the annual vacation period intervened, beginning on June 27th and lasting until July 14th. Before the end of the vacation period, Jessup had met with Lovelace and other representatives of the defendant, and it was agreed that the mine could reopen. Jessup did refuse to allow the four union drivers to return to work, contending that they had voluntarily quit work on June 16, and had refused to return to work when he requested them to do so on June 17th. A grievance was filed by these truckers and the umpire sustained Jessup's contention. Each of the union drivers was afterwards compensated by the Union apparently for obeying Union orders.

Damages.

The plaintiff seeks $1,324.17 for loss of profits and $4,492.32 for down-time or loss of use of equipment for this second work stoppage. However, as in the first labor

dispute and for similar reasons, plaintiff's damages, if any, are too uncertain and speculative to be recoverable.

Third Labor Dispute.

On October 31, 1958, upon advice of counsel, Jessup formed the Riverside Coal Company, Inc., to operate the coal business he had been operating as a proprietorship. He conveyed $5,000 worth of equipment to the corporation for a similar amount of stock, and also lent it the sum of $5,000 which was repaid several months later. His other equipment he rented to the company. He and his family remained in complete control of the business and operated it with the same employees. He continued to check off dues of the employees who were members of the Union, but refused to execute the 1958 amendment to the National Bituminous Coal Wage Agreement because his books showed he would lose money. Jessup had also obtained a long-term 25 year lease with Mercer-Moore dated May 16, 1958, and he assigned this lease to his new corporation and transferred his mining operation from Harps Hill to the lease site on Pond River.

In February of 1959, Riverside employed D. V. Goodnight as its pit foreman and also orally contracted with him for the delivery of the coal from the mine site at Pond River to the Nortonville tipple. The contract provided that Riverside would pay Goodnight a set price per ton for coal delivered. To perform his contract he hired drivers for two of his own trucks, and hired additional independent truckers, some of whom in turn hired employee drivers. He also hired a Jessup truck with a Jessup employee driver. How the coal was to be delivered was Goodnight's responsibility, and the independent character of Goodnight and the truckers and their employee drivers was stipulated by the defendant.

The Union officials continued their efforts to have Riverside sign a union contract, and Morgan advised Jessup

that unless it was signed he was going to pull the union cards of the union employees. At that time, in April, 1959, Riverside had approximately 25 employees, only five or six of whom were union card-holders. After being advised that their cards would be taken from them on April 16th, the union employees began picketing the site of the mine. A few days later they were joined by Chaney and other agents of United Mine Workers with a large number of union pickets. These pickets congregated on Highway 62 at its junction with the mine road of the plaintiff. They blocked Highway 62 on occasion, and they used threatening language, gestures and other means of coercing the employees and the independent truckers and their employee drivers. As the strike continued the pickets increased in number and Kentucky State Troopers were called to the scene to maintain order. There were ten or twelve officers on the scene in six or seven police cruisers and the officer in charge estimated that there was an average of 75 to 100 pickets. It was his opinion that due to the tension that existed the presence of the state troopers was necessary to maintain order and to keep the pickets from blocking the highway. It was while this officer was policing the pickets that Chaney told him that if he did not perform his duties that the pickets "would take the law into their own hands." Although the officer in charge testified that the troopers were needed to maintain order at the mine site, they were eventually withdrawn by the Governor on the request of union members and officials of Muhlenberg County. After the removal of the troopers the threats of violence at the mine site were intensified. The Sheriff and his one [redacted]puty did not contain the pickets as had the troopers. T[redacted]four or five truckers who continued hauling would move in convoy through the picket line and the pickets would threaten them, at times throw rocks and continually cursed them. Several employees were frightened and quit their jobs. One was threatened while going through the picket line

with the statement that it would " * * * be too bad if anything happened to my house or my wife and family * * * too bad if my house burned down * * * would be too bad if I didn't get home." One truck driver, Robert Sutton, was shot from ambush and wounded on the evening of May 16, 1959, and two shots were also fired at his brother's truck which was following him. On one occasion several pounds of roofing nails were scattered on the access road leading to the mine, resulting in flat tires on all of the trucks that were hauling. Finally, on May 16th, Riverside shut down. It operated again for several weeks in July, 1959, by agreement with Morgan, President of District 23, to load out the coal that had already been stripped.

Damages.

For the third work stoppage, Riverside and Jessup individually seek damages for loss of profits and other items totalling in excess of $7,000,000, the major item being the loss of the Mercer-Moore lease.

The books and records of the Riverside Coal Company for the fiscal year 1959 are sufficiently complete to reflect the total income and expenses attributable to its coal mining operations during that year. In spite of this fact, however, the accountants for the opposing parties reached widely divergent conclusions as to the company's financial standing before the strike. The plaintiff's calculations indicate that Riverside made a $36,860* profit for the period beginning November 1, 1958 and ending April 30, 1959, while the defendant's figures showed a loss of $26,640 for the same period.

One reason for the $63,500 discrepancy is that the defendant added $21,700 to expenses claiming that this amount was owed by Riverside to the Welfare Fund but never paid. While it is true that the incorporation of

* Even figures and amounts are used.

Jessup's proprietorship did not defeat any of the employees' rights under the collective bargaining agreement, as the plaintiff claimed it did, John Wiley and Sons v. Livingston, 376 U.S. 543 (1964); Southport Company v. National Labor Relations Board, 315 U.S. 100 (1942), it is doubtful whether the defendant can claim as an expense a disputed debt which was never collected and which was apparently abandoned by the alleged creditor.

The remainder of the discrepancy is primarily due to the difficulty of allocating the year's total expenses between the periods before and after the strike. Out of the total $199,000 in expenses for the year, the defendant allocated $147,000 to the first period compared to the plaintiff's $116,000. There was no detailed discussion of why a specific expense should have been allocated to one period rather than the other, but the plaintiff's accountant stated that many of the payments made in the first period were acually advances which were properly allocable to the period following the strike. However, he failed to give any sound basis for his apportionment, and the defendant on the other hand made no apportionment at all. While the evidence supports a finding that some of the payments made in the first period were actually made in advance and were properly attributable to the period of operations following the strike, it is impossible to determine from the record the amount of apportionment that should be made.

Besides loss of profits, the only other valid claim of damage in connection with the 1959 incident was for the loss of the Mercer-Moore lease. This was a 25 year lease covering approximately 1,900 acres of coal property which had been assigned to Riverside. It is clear that the defendant's wrongful conduct resulted in the plaintiff surrendering the lease, but it is difficult to determine what its value was over and above the amount Riverside was paying in royalties. Jessup estimated the value of the lease to Riverside at $7,000,000. This hyperbolic figure was based on an

expectation that Riverside could mine the coal at a profit of a dollar per ton and that the leased premises contained 7,000,000 tons of strippable coal.

However, his estimated dollar per ton profit was gross speculation based on entirely false assumptions. The accountant for Riverside estimated the profits at the end of April, 1959, at 48.6 cents per ton (a figure which the evidence fell far short of substantiating) and Jessup felt that the 48.6 cents per ton profit could be increased to a dollar per ton by increasing the size of Riverside's operations. He stated that he thought Riverside had increased its coal production from 8,000 tons in the first month to 23,000 tons in April, 1959, and that their goal was to continue to increase production up to 30,000 a month. However, Riverside's records indicate a reverse trend. In November, 1958, it sold 13,000 tons, while in April, 1959, it sold only 9,000 tons. The highest production was in February, 1959, when Riverside sold 14,700 tons of coal.

Jessup's largest piece of equipment was a dragline and shovel combination which was a two and a half yard machine. This is considered small in Muhlenberg County where shovels run as large as 115 cubic yards and draglines as large as 40 yards. Stovall, agent of Herman Genet, Incorporated, a subsequent assignee of the same lease, stated that they had a four yard shovel but even it was too small to be profitably operated on the lease. Write and Badgett, the business to which Herman Genet, Inc. sublet the leased premises, figured on making a profit of 50 cents per ton but they had a 40 yard dragline and counted on stripping coal up to a depth of 100 feet. They also had an adjacent tract of land which enabled them to make a substantially larger investment in mining equipment and facilities than could be made on the Mercer-Moore lease alone. In April, 1959, Riverside was stripping coal with more than 50 feet of overburden. Stovall stated he did not think even a four yard shovel was adequate to mine coal at that depth.

The average overburden for No. 9 coal was 65 feet and when Riverside ceased operations on this property it was running into a fault in the seam it had been mining. Core drillings nearest this point showed the coal to be at a depth of 70 feet. Obviously, Jessup's statement "And the way we was growing, I think in a short time our profit would have been a dollar a ton in running the coal," does not approach reality.

Likewise his estimate of 7,000,000 tons of strippable coal is greatly exaggerated. Wright and Badgett figured a maximum of 3,800,000 tons going to a depth of 100 feet. It would be a matter of pure conjecture to determine how many tons could be mined with equipment which at best could profitably go to a depth of only 50 feet; even at this depth a reasonably profitable operation is questionable.

Riverside is also attempting to project profits from this lease 25 years into the future. Considering the fact that whether it ever made an operating profit is open to some doubt, such future profits are far too speculative and remote to be recoverable. It would be extremely hazardous to guess what might happen to an established well-equipped and substantially financed business during that period, much less what might happen to a small and unproven operation like Riverside.

Riverside also claims that even disregarding profits, if it had had time to negotiate a sublease, it could have obtained a 10 to 15 cents per ton royalty in excess of what it was paying on the lease. This was based on the fact that in 1964, after investing $24,000 in advance royalties, Herman Genet, Inc. was able to sublease the property for $20,000 and a 10 cents per ton override. However, at the time of the trial Wright and Badgett had not begun mining operations on this property so no override had been realized. Furthermore, the sublease was negotiated five years after Riverside was forced to surrender the lease, and it would not be surprising if the value of the lease had con-

siderably increased during that time. A much more relevant indication of the value of the lease at the time of the tort is found in the assignment to Herman Genet, Inc. only a few months after Riverside surrendered it. That assignment was made on substantially the same terms as the assignment to Riverside.

While the proof of damages sustained as a result of this third work stoppage leaves much to be desired, it is well settled, however, that the degree of certainty necessary to establish the amount of damages is far less than the degree of certainty required to establish the fact of damages. Story Parchment Company v. Paterson Parchment Paper Company, 282 U.S. 555 (1931); Hi Hat Elkhorn Coal Company v. Inland Steel Company, 370 F. 2d 117 (6th Cir. 1966); Flame Coal Company v. United Mine Workers of America, supra; and it must be concluded the evidence presented in connection with lost profits and the value of the Mercer-Moore lease establishes that Riverside did sustain damages by reason of the defendant's wrongful conduct in the sum of $20,000.

The claims by Jessup as an individual for damages against the Union defendant are disallowed. His claim for advance royalties, rental of his equipment and the cost of its relocation after the surrender of the Mercer-Moore lease should be directed to Riverside. Moreover, the evidence does not establish with reasonable certainty that the loss of his investment in Riverside is attributable to the unlawful acts of the Union and further the recovery of damages in this action by Riverside redound to the benefit of its stockholders.

Finally, the claim of the plaintiff for punitive damages is denied. While under Kentucky law punitive damages may be recovered, Flame Coal Company v. United Mine Workers of America, supra; United Mine Workers of America v. Osborne Mining Co., supra; Gilchrist v. United Mine Workers of America, 290 F. 2d 36 (6th Cir. 1961), the facts of

this case do not justify such an award. Jessup's provocative acts of violence cannot be excused. The granting of exemplary damages rests entirely in the discretion of the finder of facts. Hurst v. Southern Railway Company, 184 Ky. 684, 212 S.W. 461 (1919); Kentucky Central Railroad Co. v. Gastineau, 83 Ky. 119 (1885); Louisville & Nashville Railroad Co. v. Cottengim, 31 Ky. L. R. 871; 104 S.W. 280 (1907).

Judgment in accordance with this memorandum is this day entered.

September 8, 1967

(Filed September 11, 1967)

Judgment

This action came on for trial before the Court and the issues having been duly tried and a decision having been duly rendered,

It Is Ordered and Adjudged that the plaintiff, Riverside Coal Company, Inc., recover of the defendant, United Mine Workers of America the sum of $20,000 with interest thereon at the rate of 6 per cent per annum as provided by law and the costs of this action.

It Is Further Ordered and Adjudged that the plaintiff, James Jessup, individually and d/b/a Jessup Coal Company, take nothing and this action as to him is dismissed on the merits.

September 8, 1967

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18293

RIVERSIDE COAL COMPANY, INC., a Kentucky Corporation,
Plaintiff-Appellee,

v.

UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant.*

Appeal from United States District Court for the Western District of Kentucky

Decided April 4, 1969

Before: WEICK, Chief Judge, O'SULLIVAN and EDWARDS, Circuit Judges.

WEICK, Chief Judge. In the District Court the plaintiffs, James Jessup, an individual doing business as Jessup Coal Company (Jessup), and Riverside Coal Company, Inc. (Riverside), sued United Mine Workers of America (UMW) for damages to their respective businesses resulting from the alleged violation by UMW of § 303 of the Labor Management Relations Act of 1947[1], and the common law of Kentucky.

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[1] Section 303 of the Labor Management Relations Act, 1947, 29 U.S.C. § 187, which was in effect at the time, provides:

"SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any

The case was tried to the court without a jury. The District Judge, in an opinion appearing on eighteen pages of the printed record, found violations by UMW of both § 303 and the common law of Kentucky, and that Riverside was

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other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if other labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

damaged as a proximate result thereof in the amount of $20,000, for which amount he entered judgment against UMW. He found no damage for which Jessup was entitled to recover and dismissed the complaint as to him. Only UMW has appealed. We affirm.

The first question presented by UMW is whether the action was barred by the Kentucky statute of limitations, K.R.S. 413.140, which provided that an action for conspiracy shall be commenced within one year after the cause of action accrued.

Conspiracy is not an element of the claim for violation of § 303 which involved a secondary boycott, the purpose of which was to force Riverside to recognize or bargain with UMW. K.R.S. 413.140 would therefore not apply to an action brought under § 303.

While the complaint by an amendment alleged that the acts of UMW also constituted an unlawful conspiracy, it is clear that plaintiffs' cause of action under the common law of Kentucky was for wrongful interference with plaintiffs' business. This is a tort which has long been recognized by the courts of Kentucky. *United Construction Workers* v. *New Burnside Veneer,* 274 S.W.2d 787 (Ky. 1955).

Although violations of both § 303 and the common law of Kentucky are alleged, these were not separate causes of action but were merely different grounds to support plaintiffs' single cause of action for wrongful interference with its business. *United Mine Workers* v. *Meadow Creek Coal Co.,* 263 F.2d 52 (6th Cir. 1959).

The District Judge was correct in applying Kentucky law and in holding that the one-year conspiracy statute of limitations was inapplicable.

UMW next contends that § 6 of the Norris-LaGuardia Act[2] applies in determining its responsibility for the acts of its agents and members. It argues that plaintiff did not establish by clear proof that UMW or the officers and field representatives of District 23 of UMW actually participated in or authorized or ratified the unlawful acts of individual officers, members or agents, and that UMW had no knowledge thereof.

Section 6 was repealed in part by the Labor Management Relations Act—

> "... which expressly provides that for the purposes of that statute, including § 303, the responsibility of a union for the acts of its members and officers is to be measured by reference to the ordinary doctrines of agency, rather than the more stringent standards of § 6." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 736 (1966).

Section 6 therefore applies only to the claim for violation of the common law of Kentucky and not to the § 303 violation where the ordinary doctrines of agency control. In *Gibbs*, the District Court had found no violation of § 303, but retained pendent jurisdiction and tried the case under the common law of Tennessee. It was therefore necessary in *Gibbs* to determine the liability of UMW under the strict provisions of § 6.

In the present case, however, the District Court found that "there is clear and substantial proof to establish

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[2] Section 6 reads:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

agency so as to hold the union responsible for the wrongful acts of these officers, both on the claim asserted under Section 303 and the state claim" based on the common law of Kentucky. In our opinion, these findings were supported by substantial evidence and are not clearly erroneous.

The Supreme Court has interpreted the standards set forth in § 6 and has stated:

> "We are of the opinion that the requirement of 'authorization' restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence." *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 406-407 (1947).

The Court continued by way of amplification:

> "There is no implication in what we have said that an association or organization in circumstances covered by § 6 must give explicit authority to its officers or agents to violate in a labor controversy the Sherman Act or any other law or to give antecedent approval to any act that its officers may do. Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the

Sherman Act and disclaiming union responsibility for such agreements. . . . The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of an illegal agreement after its execution. And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union." *Id.* at 409-410.

The District Court found that the issues of the case arose out of three labor disputes between Jessup, Riverside and UMW. The first two disputes involved Jessup and UMW. The third dispute involved Riverside and UMW. Jessup was the principal shareholder of Riverside and his family owned the residue of its issued shares. The primary cause of the labor disputes, as found by the Court, did not arise out of the traditional struggle between a union and a non-union mine operation.

Jessup was a small mine operator. He had signed a contract with UMW when he was engaged in business as an individual, even though he stated that he could not afford to make the Welfare and Retirement Fund payments of forty cents per ton. He paid only about twenty-five per cent of the payments due and misrepresented the tonnage produced. After incorporation of Riverside, Jessup refused to sign the National Bituminous Coal Wage Agreement of 1950 as amended, not because he was opposed to having a union shop, but because of the economic fact that he could not operate at a profit under the agreement. He did, however, check off the union dues of his employees who belonged to the union.

The District Court found that during the time material to this action, Arthur Chaney, a district representative of

District 23 of UMW, was charged, together with other representatives of UMW, with the duty of persuading coal operators to sign the National Bituminous Coal Wage Agreement of 1950 as amended. UMW concedes that these men were its agents. It questions only their authority to commit the unlawful acts shown.

The District Court also found that on October 7, 1957, Chaney was going to help Jessup's truck drivers to ". . . fight it out . . . . We make our own rules and go by them."

The District Court continued:

> "On October 8, 1957, he threatened '. . . if the men didn't come out of the pit, they was going up there and beat them up and throw them out.' Then on October 16, 1957, he threatened the truck drivers that if they did not cease hauling coal their trucks would be overturned. On the same date he went to the mine and threatened the plaintiff's employees. On June 13, 1958, he and some pickets went to the pit and threatened the employees 'If they didn't get out, he was going to throw every damn one of them out. . . .' On the same date, he told plaintiff that he was going to put him out of business saying 'We are going to do away with every damn one of you little dog holes. . . . They ain't [sic] nothing but a headache. We want you out of business and get out of our way.' . . . On the occasion that Jessup appeared to run him down, Chaney and another representative of the Union angrily told the officer in charge of the state troopers that if he didn't do something about it '. . . they would take the law into their own hands.' On May 16, 1959, he threatened the pit employees, saying 'We'll get you . . . if we don't get you down here, we'll get you on the way home. You'll never eat supper at home tonight.' "

This recounting of the evidence clearly indicates that UMW's agents were actually involved in the threats of

violence which took place. The issue, therefore, joined is whether UMW can be held responsible for the acts of its agents charged generally with extending the "National Agreement."

In *Gibbs,* the Supreme Court was faced with a similar question of whether an international union was liable for the acts of its agents within § 6. *United Mine Workers* v. *Gibbs, supra* at 735. It seems implicit in the Court's discussion that the actions of the international's filed representative, George Gilbert, could have been sufficient to hold the union liable. In footnote 28 on page 737, the Court stated:

> "Liability of the international union is premised on the acts of Gilbert and the UMW's other agents, or not at all."

In narrowing the issue therein involved, the Court stated:

> "The relevant question, however, is whether Gilbert or other UMW representatives were clearly shown to have endorsed violence or threats of violence as a means of settling the dispute." *Id.* at 741.

Although the Supreme Court in *Gibbs* did not find the evidence sufficient to warrant finding the international union liable, here it is clear that UMW's agents actually participated in the threats of violence. In view of the authorities and the evidence, UMW must be said to have "participated in" or "actually authorized" the acts of its appointed agents charged with the extension of the 1958 Amendment. Thus, the requirements of § 6 have been met as to the common law claim.

UMW further contends that the evidence does not support a finding of a violation of § 303. Essentially, it argues that there was no secondary boycott within the meaning of the statute: rather, it contends that the activity of its members constituted lawful picketing.

The policy objective embodied in § 8(b)(4)[3] is an attempt to balance the right of labor organizations to bring pressure to bear upon offending employers in primary labor disputes and at the same time shield unoffending employers and others from pressures in controversies which are not their own. *NLRB* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 692 (1951) and *United Steelworkers* v. *NLRB,* 289 F.2d 591, 594 (2d Cir. 1961).

It is clear that the activity of the members of the union picketing the entrance to the mine is not secondary activity prohibited by § 8(b)(4), even though this entrance was used by independent truckers as well as regular employees of the mine. *United Steelworkers* v. *NLRB,* 376 U.S. 492, 498-499 (1964); *Local 761, Elec. Workers* v. *NLRB,* 366 U.S. 667, 680-682 (1961).

The Supreme Court said in *Local 761, Elec. Workers* v. *NLRB, supra* at 681:

> "[I]f a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations."

Surely in the case before us, the barring of picketing at an entrance used by both the regular primary employees and neutral truckers would constitute a "clear invasion on traditional primary activity" of appealing to the primary employees.

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[3] 29 U.S.C. § 158(b)(4). It has long been recognized that § 8(b)(4) is the counterpart of § 303(a) and therefore the same tests and rationale apply to both in regard to the facts necessary to give rise to the relief specified in each. Only the relief specified differs. *International Longshoremen* v. *Juneau Spruce Corp.,* 342 U.S. 237, 243-244 (1952); *United Brick Workers* v. *Deena Artware Inc.,* 198 F.2d 637, 639 (6th Cir. 1952), *cert. denied,* 344 U.S. 897; *Haughton* v. *International Woodworkers,* 168 F.Supp. 273, 278 (D.C. Ore. 1958), *aff'd* 294 F.2d 766 (9th Cir. 1961).

Nor does primary picketing accompanied by threats and violence constitute a violation of § 8(b)(4). *United Steelworkers* v. *NLRB, supra* at 501-502.

The issue, therefore, is whether there is substantial evidence of proscribed activity which supports the finding of the District Court of violations of § 303.

A review of the record indicates a clear pattern of threatening and violent conduct, not only at the site of the picketing but also at various locations away from the primary site. Raymond Bethel, a self-employed truck driver engaged by D. V. Goodnight, testified that during the labor dispute herein involved he crossed the picket line and was often subjected to the cursing and rock-throwing of the pickets. On two occasions Bethel was awakened at night by loud noises which sounded like large firecrackers going off very close to his house. He also testified that carloads of men passed his house, yelling, and that this frightened both his family and his neighbors. He stated that on one occasion the automobile carrying the men was that of Arthur Chaney. These events occurred only during the time of the labor dispute.

Robert Sutton, a truck driver, who owned the truck he used while hauling during this labor dispute, was shot from ambush on May 16, 1959, just a short distance from his home. Two shots were also fired at his brother's truck which was following close behind him. This incident took place while both men were returning to Robert Sutton's home after a day's hauling through the picket line at the site of the dispute.

Appellant does not dispute the finding of the District Court as to the independence of these truckers; rather, it urges that these truckers were not neutral to this dispute. This same question was presented before this Court in *United Mine Workers* v. *Osborne Mining Co.*, 279 F.2d 716 (6th Cir. 1960) *cert. denied,* 364 U.S. 881, where we held

that truckers for a strip mining operation, who were as independent as those here involved, were "neutral." *Id.* at 724. Thus, the above threats and violence were directed at neutral secondary parties away from the primary site, and therefore were clearly violative of § 303.

These are not, however, the only coercive and threatening acts which occurred away from the primary site. Pat Martin, who was Assistant General Manager of Norton Coal Company, testified that he received an anonymous telephone call threatening bodily harm if his company continued affiliation with the Riverside Coal Company. This call was received in Nortonville, Kentucky.

Willie Gary, a dragline operator for appellees, testified that organizers came to his home in Hartman, Kentucky, which was about twenty-five miles from the mine site. These men advised him not to return to work because they were trying to get Jessup to sign a contract. This incident frightened Gary and his family.

Although Pat Martin was not an "employee" within § 2(3) of the Act, and Willie Gary was an employee of the primary employer, so that the above-mentioned activities involving these two men were not violations of § 303, these incidents do illustrate the nature of the nonprimary situs activity involved in this case.[4]

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[4] Section 2(3) of the Act provides:

"SEC. 2. When used in this Act—

* * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at

It is clear that there is substantial evidence to support the findings of the District Court and they are not clearly erroneous.

Finally, UMW contends that the finding of the District Court that "the evidence presented in connection with lost profits and the value of the Mercer-Moore lease establishes that Riverside did sustain damages by reason of the defendant's wrongful conduct in the sum of $20,000" is clearly erroneous. UMW asserts that the evidence is insufficient to support the finding of damages in the amount of $20,000, and that the award is not limited to the consequences of "violent" conduct. Thus it is claimed that the award of damages was "based on total strike activity and not confined to the direct consequences of violent conduct."

The questions raised concerning damages are essentially question of fact, and at least with regard to the alleged damages resulting from lost profits, the law is clear and not disputed. As stated in *United Mine Workers* v. *Osborne Mining Co., supra* at 727:

> "Profits are recoverable where there is an established business and they can be proven with reasonable certainty."

Lost profits are not recoverable when based upon "sheer speculation and guesswork." *Mitchell Coal Co.* v. *UMW*, 213 F.2d 78, 79 (6th Cir. 1963).

It has long been recognized that once the fact of damage has been properly shown, "uncertainty as to their amount

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his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

See *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 51 (1964) where the Court notes the limitations placed on the pre-1959 Act by virtue of the above definition and the language of § 8(b)(4).

will not foreclose recovery." *Flame Coal Co.* v. *UMW*, 303 F.2d 39, 44 (6th Cir. 1962), *cert. denied*, 371 U.S. 891; *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U.S. 555, 562-563 (1931); *Hi Hat Elkhorn Coal Co.* v. *Inland Steel Co.*, 370 F.2d 117, 118 (6th Cir. 1966).

These principles were recognized and applied by the District Court. In the first two of the three disputes before the trial court damages were not allowed because they were "too uncertain and speculative." Jessup's records were incomplete and "the only basis for his claim that he was making a twenty-five per cent profit was his unsupported statement."

As to the third dispute, however, the District Court found that the records of the Riverside Coal Company for the fiscal year 1959 were "sufficiently complete to reflect the total income and expenses attributable to its coal mining operations during that year." The problem with these records is that Riverside's figures show a profit of $36,860 (rounded figures are used) on production pursuant to its two TVA contracts during the period from November 1, 1958 to April 30, 1959, while UMW's figures indicate a loss of $26,640 for the same period.

The first major item contributing to the large difference between the above figures, is that UMW added $21,700 to Riverside's expenses claiming that this amount was owed but unpaid by Riverside to its Welfare Fund. The District Court found that the incorporation of Jessup's proprietorship did not defeat the employees' rights under the existing collective bargaining agreement. See *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 548-551 (1964); *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942). The District Court disregarded this alleged expense on the ground that it was a disputed, unliquidated debt.

The next item which the appellant claims should have been included as an expense is $13,708, sales commissions paid to the Norton Coal Company. This assertion was re-

butted by Riverside's showing that this amount was deducted by Norton Coal Company before payment for the coal was forwarded to Riverside.

The remainder of the discrepancy is due primarily to "the difficulty of allocating the year's total expenses between the periods before and after the strike."

The only other claim of damage in connection with this dispute which the District Court found to be valid, was related to the loss of the Mercer-Moore lease. This was a twenty-five year lease covering about 1,900 acres of coal property. Riverside claimed that the lease was worth $7,000,000. This lease had been assigned by Jessup to Riverside. It is clear that the loss of this lease was a source of damage to Riverside. The real question here is the amount of that loss. The District Court properly depreciated many of Riverside's wild and inflated assertions as to the value of the lease.

The Court found:

> "A much more relevant indication of the value of the lease at the time of the tort is found in the assignment to Herman Genet, Inc. only a few months after Riverside surrendered it. That assignment was made on substantially the same terms as the assignment to Riverside."

Genet paid four thousand dollars for the lease. The price also included payment of three hundred dollars per month advance royalties, and after going into production fifteen cents per ton for strip coal and ten cents per ton for underground coal.

Considering all of the evidence on damage, we think it was sufficient to support an award in excess of that allowed by the District Court.

Appellant's second assertion with regard to damages is, in effect, that the District Court allowed damages resulting

from legal as well as illegal conduct. It is clear that in actions seeking damages for alleged illegal conduct by labor unions, the award of damages must be based upon that element of the activity which is in fact violative of state or federal law. But damages may not be awarded where they are the result of lawful activity on the part of a union. *United Mine Workers* v. *Gibbs, supra* at 729-732; *Local 20, Teamsters* v. *Morton,* 377 U.S. 252, 259-261 (1964). Thus, federal labor policy must prevail in this area so that unions are not made to account for damages resulting from conduct which is legal under federal labor law. *United Mine Workers* v. *Gibbs, supra* at 729.

The Supreme Court, however, has also recognized that—

> "... [S]pecial facts, if they appeared in an action for damages after picketing marred by violence had occurred, might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." *Id.* at 731-732.[5]

See also *United Mine Workers* v. *Osborne Mining Co., supra* at 726-727.

In the case before us, the trial court found that the damages were sustained by reason of UMW's "wrongful conduct." The record is replete with incidents of violence and threats of violence on the picket line and elsewhere. In

[5] Our colleague, in his dissenting opinion, would remand for computation of damages resulting only from violation of the common law of Kentucky. In our judgment, remand is wholly unnecessary for here as in *Gibbs* there was only one cause of action although based on two different grounds. Furthermore, violence was involved in both primary and secondary activities and the consequences were inseparable. The evidence supports the conclusion that *all* damages were proximately caused by the violent component.

addition, there was illegal secondary activity. As we noted in the *Osborne* case, *supra*:

> "The findings of the trial judge indicate the factors he took into account in allowing compensatory damages. He resolved many disputed issues of fact. It has not been demonstrated to us that the Court made any mistake in his findings of fact relating to damages or that he applied the wrong rule of law. We think that under all the facts and circumstances of the case the Court was justified in making the award which he did and we are not disposed to disturb it." *Id.* at 727.

Affirmed.

EDWARDS, Circuit Judge dissenting.

The District Judge found a secondary boycott in violation of § 303 of the LMRA. His general assessment of damages included damages for the secondary boycott. This court's opinion affirms both the secondary boycott finding and the damage award partially based thereon.

The facts primarily relied upon to justify the secondary boycott finding relate to UMW activities (or activities attributed to the UMW) directed toward keeping truck drivers from loading coal at the struck mine site. Clearly, some of these activities were illegal under the laws of Kentucky, and where clear proof is available as to appellant UMW's responsibility therefor, an award of damages is justified.

But the truck drivers were directly engaged in the primary activity against which the strike was called. This work could not be called "unrelated to the normal operations of the employer." *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 681 (1961); *see NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 686-87 (1951). The truck drivers were within the jurisdiction of the union which called the strike. Many of them were

members of the UMW. Absent acts of violence the strike was a lawful labor dispute.

The Supreme Court has squarely held that acts of violence (rendered both unlawful and remediable under state law) do not serve to change primary labor activity into illegal secondary activity:

> "[W]e reject Carrier's argument that whatever the rule may be in the ordinary case of separate gate picketing, the picketing of the railroad gate in this case was violative of § 8(b)(4) because it was accompanied by threats and violence. Under § 8(b)(4) the distinction between primary and secondary picketing carried on at a separate gate maintained on the premises of the primary employer, does not rest upon the peaceful or violent nature of the conduct, but upon the type of work being done by the picketed secondary employees. Such picketing does not become illegal secondary activity when violence is involved but only when it interferes with business intercourse not connected with the ordinary operations of the employer.[8] *Steelworkers* v. *NLRB*, 376 U.S. 492, 501-02 (1964).

> "[8] Compare *Labor* v. *Rice Milling Co.*, 341 U.S. 665, 672, in which the Court said: 'In the instant case the violence on the picket line is not material. The complaint was not based upon that violence, as such. To reach it, the complaint more properly would have relied upon § 8(b)(1)(A) or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8(b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt.'
> . . ."

I believe the District Judge's holding as to secondary boycott activities is erroneous as a matter of law. I would reverse and remand for computation of damages resulting only from violations of the common law of Kentucky.

(Filed April 4, 1969).

Judgment

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss
Clerk

STATUTES INVOLVED

Labor Management Relations Act, 1947

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organiza-

tion or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue there-

for in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. 185. *Suits by and against labor organizations—Venue, amount, and citizenship*

* * *

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Norris-LaGuardia Act

29 U.S.C. 106, 47 Stat. 71: *Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents*

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.